1975

The State of Utah, by and through its Industrial Commission; The State of Utah, by and through its Road Commission; and Flowell Electrical Association INC.. v. Cox Construction Company Inc. : Brief of Respondent, State of Utah

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

RANDY OLSEN, by and through his Guardian ad Litem, Gaylen R. Olsen,
Plaintiff and Appellant,

vs.

THE STATE OF UTAH, by and through its INDUSTRIAL COMMISSION; THE STATE OF UTAH, by and through its ROAD COMMISSION; and FLOWELL ELECTRICAL ASSOCIATION, INC., a corporation,
Defendants and Respondents.

Case No. 13867

THE STATE OF UTAH, by and through its INDUSTRIAL COMMISSION; THE STATE OF UTAH, by and through its ROAD COMMISSION,
Third-Party Plaintiffs,

vs.

COX CONSTRUCTION COMPANY, INC.,
Third-Party Defendant.

BRIEF OF RESPONDENT, STATE OF UTAH

Appeal from Judgment of the District Court in and for
Salt Lake County, State of Utah
Honorable G. Hal Taylor, Judge
Honorable Maurice G. Harding, Judge

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BRIEF OF RESPONDENT, STATE OF UTAH

NATURE OF THE CASE

This is a personal injury action seeking recovery of damages for bodily injury suffered in a construction accident which occurred in the course of Appellant's employment.

DISPOSITION IN LOWER COURT

The District Court of Salt Lake County, Honorable G. Hal Taylor presiding, granted summary judgment in favor of Respondent, Flowell Electrical Association,

no cause of action. Later, the District Court, Honorable Maurice Harding presiding, granted summary judgment in favor of Respondent, State of Utah, no cause of action.

RELIEF SOUGHT ON APPEAL

Respondent, State of Utah, seeks affirmance of the judgment below.

STATEMENT OF FACTS

The Appellant has failed to accurately and fully state the undisputed facts and, therefore, a restatement of the facts is necessary.

This action arose out of an accident that occurred on September 6, 1972, near Meadow, Utah, during the construction of a section of Interstate Highway 15. Appellant, a laborer employed by Cox Construction Company, was assisting the pouring of cement on a bridge deck from a large steel bucket suspended from the cable of a crane when the supporting cables of the boom contacted an overhead power line owned by the Flowell Electrical Association. An electrical charge of 14,400 volts was transmitted to the bucket causing serious injuries to the Appellant.

A week prior to the accident, Brent Cox, the superintendent of the Cox Construction Company, contacted Flowell Electrical officials to review the construction site and to make arrangements for de-energizing the power line located approximately 29 feet above the bridge

deck where the cement pour was to proceed. [Cox Deposition, pp. 13, 21]. Ralph Robinson, a Flowell Electrical Association employee, inspected the site and informed Cox that the power line serviced several customers and requested that, if possible, the pour be arranged to avoid interruption of power. [Cox Deposition, pp. 16, 21]. Brent Cox advised Robinson that cement could be delivered to the site with a concrete pump, rather than a crane, thus eliminating the need to terminate power. [Cox Deposition, p. 15]. Since the cement pump was to be used, no arrangements for terminating power were made and Robinson asked Cox to notify the power company if he "needed any help." [Cox Deposition, p. 15]. Cox agreed to notify Flowell if terminating power became necessary. [Cox Deposition, p. 15, 21-22].

On the day of the accident, Cox attempted to use a concrete pump specifically ordered for the job, but the pump failed to function properly. [Cox Deposition, pp. 30, 31]. Cox ordered the 40 ton crane moved into the area while he drove to Fillmore, a distance of approximately 15 miles, to contact Ralph Robinson to request cutting electrical power. [Cox Deposition, p. 32]. He was unable to contact Robinson, or any other Flowell employees, and he returned without making arrangements with the power company. [Cox Deposition, p. 32].

In Cox's absence, the employees began using the crane to deliver cement to the north side of the bridge deck away from the power line. [Cox Deposition, p. 35]. A large steel cement bucket suspended by cable from the boom was used for this purpose. When Cox returned, he

supervised the completion of the pour on the north side and then ordered the crane moved to the south side near the overhead electrical wire. [Cox Deposition, p. 36].

Cox remained on the scene to directly supervise the total concrete operation and to observe the movement of the crane. [Cox Deposition, p. 37]. Cognizant of the nearby electrical wire, he continuously spoke with the crane operator concerning the movement of the crane boom. [Cox Deposition, p. 68]. The Appellant and a fellow employee, Darwin Jensen, positioned the cement bucket for each pour by using hand signals. [Cox Deposition, p. 39].

Just prior to the accident, Brent Cox instructed the Appellant and Jensen to pour one more bucket in the same position as the previous load and ordered them not to direct the crane boom any closer to the overhead power line. [Cox Deposition, pp. 68-70]. The accident occurred when the Appellant and his fellow employee directed the final bucket of cement into position and the crane boom or supporting cable brushed against the high voltage wire.

The only State employee present at the construction site at the time of the accident was Franklin Drew Rasmussen. The State of Utah by its Road Commission had engaged Cox Construction Company for construction of this section of interstate highway. Rasmussen was a laboratory technician assigned to the project to insure that concrete was poured in accordance with quality and design specifications. [Rasmussen Deposition, p. 48]. Contrary to Appellant's assertion, Rasmussen was not

a safety inspector and did not have authority to dictate construction procedures. [Rasmussen Deposition, pp. 8, 11-12]. If he observed unsafe practices, his duty and authority was limited to alerting the contractor or state inspectors. [Rasmussen Deposition, pp. 11-12].

Approximately 20 minutes before the accident, Rasmussen testified that he became concerned because the boom of the crane appeared to be maneuvering too close to the power line. Rasmussen expressed this concern to Brent Cox. Cox notified the crane operator to move the crane, which was done. [Rasmussen Deposition, p. 24]. Approximately 15 minutes later, Rasmussen noticed the boom was again too close to the wire and he again notified Brent Cox. Cox requested Rasmussen to advise the crane operator to move the boom away from the wire and Rasmussen did so. [Rasmussen Deposition, pp. 24-25]. Rasmussen then returned to his truck to complete a test he was conducting. The crane operator did not move the crane, but continued the pour, intending to move it after he dumped one more bucket. [Rasmussen Deposition, p. 25].

Because the Appellant was injured in the course and scope of his employment with Cox Construction Company, he has received Workmen's Compensation payments incident to his injuries.

The Appellant's claim against the State of Utah rests upon two claims. First, Appellant alleges the Industrial Commission violated a duty imposed by Sec. 35-1-16(1), U.C.A. 1953 as amended, to supervise every place of employment. Second, Appellant contends the

Road Commission employee negligently failed to direct and supervise the construction work undertaken by Cox Construction Company.

The trial court granted summary judgment in favor of the State of Utah because the Appellant failed to state a claim upon which relief can be granted. The court held that neither the Industrial Commission nor the Road Commission violated any duty upon which an award of damages can rest. Moreover, if any duty did exist, the Workmen's Compensation Act bars any recovery by this Appellant against the State. Finally, as a matter of law, the negligence of the Appellant's employer was the sole proximate cause of the accident.

ARGUMENT

POINT I

THE STATE OF UTAH OWED NO DUTY TO THE APPELLANT UPON WHICH AN AWARD OF DAMAGES CAN BE BASED.

A. *The Industrial Commission's general duty to supervise places of employment and to enforce safety regulations cannot be the basis for civil liability.*

Appellant contends the State of Utah is liable for damages on the theory that the Industrial Commission breached a duty to supervise his employer and to enforce safety regulations. The Appellant relies on Sec. 35-1-16(1), U.C.A. 1953 as amended, which states:

> It shall be the duty of the commission, and it shall have full power, jurisdiction and authority:
>
> (1) to supervise every employment and place of employment and to administer and enforce all laws for the protection of the life, health, safety and welfare of employees.

In support of his contention, Appellant cites *Peterson v. Fowler,* 27 Utah 2d 159, 493 P.2d 997 (1972), where the Court held that an architect did not have a duty to insure that employees of contractors were furnished with a safe place to work. In *dicta,* the Court mentioned that such a duty lies with the Industrial Commission.

Appellant cites no case where a general duty to enforce laws for public health and safety has formed a basis for civil liability. Indeed, contrary to Appellant's contention, it is well established that statutes imposing a general duty for the benefit of the public do not create any right or discernible standard of care upon which civil liability can be determined.

In *Kirk v. United States,* 270 F. 2d 110, (9th Cir. 1959), a case closely analogous to the instant suit, the court sustained a summary judgment for the defendant because no actionable duty to enforce safety regulations existed. In *Kirk,* plaintiffs brought an action under the Federal Tort Claims Act for wrongful death of a carpenter who fell to his death from a scaffolding during construction of a dam located on federal property. The deceased was an employee of an independent contractor engaged in the construction of the dam. The plaintiffs al-

leged the Army Corps of Engineers had a duty to enforce safety standards prescribed by Army regulations. The United States was represented on the project by inspectors whose duty it was to see that the contractor complied with all safety provisions. When the plaintiff fell, there were no safety nets under the scaffolding and no ropes or buoys in or near the area as the safety standards required. As a result, the deceased plunged into the river below the work area.

The Court rejected the argument that the plaintiffs had a civil remedy against the government merely because it had breached a duty prescribed by statute, regulations, manuals and directives to conduct a continuous and comprehensive accident prevention and rescue program. The Court held:

> The general rule is that a statute which does not purport to establish a civil liability, but merely makes provision to secure the safety or welfare of the public as an entity, is not subject to a construction establishing a civil liability. 50 Am. Jur. 582, *Statutes,* §586. 270 F.2d at 117.

In *Kirk,* the statute under consideration did not define a degree of care imposed on the Army in the exercise of its general duty to promulgate and enforce safety regulations. In the absence of a legislatively defined standard of care, the Court correctly concluded that Congress did not intend to create a duty, the violation of which, could give rise to civil liability. The Court reasoned:

> Every Government employee must trace the duties of his job to some law, regulation, or order, but this does not mean that in every such case there is thereby established a duty of care on the part of

> the employee and the Government toward those who may be incidentally benefitted if those duties are properly performed, or toward those who may be incidentally injured if those duties are not properly performed. *Id.* at 118 (Citations omitted.)

Similarly, in *United States v. Page,* 350 F.2d 28 (10th Cir. 1965), *cert. denied,* 382 U.S. 979, an action was brought under the Federal Tort Claims Act for wrongful death of an employee of Hercules Powder Company who was killed in an explosion at Bacchus, Utah, during experiments with solid fuel rocket propellants. The government engaged Hercules as an independent contractor for research and development purposes in connection with an experimental fuel. As in *Kirk,* government officers were charged with the duty of overseeing the contractor to insure that it performed its duties in accordance with safety regulations. An Air Force officer who had the title of "Safety Engineer," was assigned to the project whose duty it was to "monitor" the contractor's safety performance.

The trial court found that the government employees were negligent because they did not properly supervise the industrial safety practices of the contractor, did not prescribe additional safety practices and did not properly inspect the government property as to safety. The Circuit Court reversed the trial court decision with a direction to dismiss the case. The Court held that the safety regulations imposed no duty upon the government which could be the basis of creating civil liability for injuries suffered by employees of the independent contractor. The Court stated:

> Hercules had the primary responsibility for the safety of its employees; it had the direct control and supervision over them, and they were working in its plant. Further, it had the duty to perform and supervise the individual functions, the total of which produced the end product. . . . It and the safety of those then working was under the exclusive control and supervision of Hercules. The safety program of the government did not constitute an exercise of any such control. The fact that the activity may be dangerous has no consequences on this issue. 350 F.2d at 31.

As in *Kirk* and *Page,* the statute upon which Appellant relies in the present case defines a mere general duty for the benefit of the public as an entity. The statute does not impose a standard of performance upon which liability may be determined. In the absence of an expressed intention in the statute to create civil liability, and without a discernible standard of care imposed by legislative mandate, the statute cannot be construed to grant individual employees a cause of action against the Industrial Commission.

The importance of the distinction between a general duty to the public upon which civil liability may not be based, and a specific duty with a discernible standard of care is made apparent by viewing statutes analogous to the one at issue in this case. Section 27-10-4, U.C.A., 1953 as amended, states that it shall be the duty of the State Highway Patrol to enforce the laws and rules and regulations of the State governing the use of the State highways. The presence of a highway patrolman to discover and abate every violation of every

safety rule of the highway would clearly benefit motorists. Nevertheless, a motorist injured by a speeding vehicle may not maintain a right to recover damage from the State because a patrolman did not happen to be present to discover the violation in time to halt it.

To the contrary, the primary duty to obey highway safety regulations lies with each motorist notwithstanding the general duty of the Highway Patrol to enforce compliance. In the instant case, the actionable duty to provide a safe place of employment and to heed safety procedures lies with the employer and not with the Industrial Commission.

In addition to recognized rules of statutory construction, sound public policy requires rejection of the Appellant's argument. The statute upon which Appellant relies charges the Industrial Commission with the general duty of supervising every employment and place of employment to enforce all laws for the protection of employees. If a specific duty arising by virtue of this statute is owed to each employee upon which liability may rest, the presence of an inspector would be required at the side of each employee on every single job. The legislature could not have intended to create a cause of action for failing to perform such an impossible task.

Finally, even if Sec. 35-1-16, U.C.A. 1953, as amended, sets forth a discernible duty of care to which the Industrial Commission is bound, subsequent provisions of Utah law clearly limit the extent to which the

State is liable to injured employees. Sec. 35-3-1, U.C.A. 1953, as amended, establishes the State Insurance Fund as the exclusive means by which the State will be liable for employment related injuries. That statute expressly states: "There shall be no liability on the part of the State beyond the amount of such fund."

Thus, if the Industrial Commission fails to exercise the requisition degree of care in its enforcement of safety regulations, the State is liable only to the extent of Workmen's Compensation benefits. If the Appellant relies on a duty created by statute, the extent of the liability created thereby may also be limited by statute. The legislature has clearly done so in cases of this nature.

Because the Appellant does not allege that the Industrial Commission committed any acts of affirmative negligence, and, in any event, since his action is precluded by statute, he fails to state a claim upon which relief can be granted. Consequently, this Court should affirm the judgment of the court below.

B. *The State Road Commission owed no duty to the Appellant upon which liability may be based.*

In Utah, and throughout the country, courts have uniformly held that an employer is not liable for the negligence of an independent contractor that causes injury to the contractor's employee. *Prosser, Law of Torts,* §70 (1964); *Restatement of Torts 2d,* §409; 57 *C.J.S., Master and Servant,* §610 (1948). An employer

owes to the servant of an independent contractor the duty to avoid endangering him by his own negligence or affirmative act, but owes no duty to protect him from the negligence of his own master.

The general rule negating the Appellant's claim against the Road Commission in this case has long been recognized in Utah. In *Dayton v. Free,* 46 Utah 277, 148 P. 408, (1914), the plaintiff, an employee of an independent contractor, brought suit against the owner of the property upon which the plaintiff was working pursuant to a subcontract agreement for construction of a tunnel. The plaintiff alleged that the owner of the property and the contractors for the project negligently overlooked a buried explosive which discharged injuring him. The owner of the property in its agreement with the contractor reserved the right to see that the work was done properly, but did not reserve the right to supervise, direct or control the methods or means by which the work was accomplished. Rejecting the plaintiff's claim against the employer-landowner, the Supreme Court stated:

> We think, therefore, that the case comes within the general rule that when a person employs a contractor to do work lawful in itself and involving no injurious consequences to others, and damage arises to another through the negligence of the contractor or his servants, the contractor, and not the employer, is liable. We think the ruling right. 148 P. at 412.

More recently, in *Stevens v. Colorado Fuel and Iron,* 24 Utah 2d 214, 469 P.2d 3 (1970), an action closely analogous to the instant case, a suit was brought for

wrongful death on the claim of a breach of duty to inspect and make safe places where men worked. The defendant was the owner of a mining claim who had contracted with the deceased's employer for the loading of ore on the property. The plaintiff based his claim on the theory that the defendant had a duty to inspect work for safety and that this duty extended to employees of contractors. The Supreme Court affirmed the trial court's dismissal of the plaintiff's complaint and said:

> Plaintiffs are confronted with a dilemma. If (the contractor) were an agent subject to the supervision and control of the defendant, defendant would be an employer (Section 35-1-42, U.C.A. 1953) and under Section 35-1-60, U.C.A. 1953, the compensation awarded under the Workmen's Compensation Act would be the exclusive remedy. If [the contractor] were an independent contractor, the dangerous condition which allegedly caused Stevens' death would not be subject to the supervision and control of defendant. 469 P.2d at 4-5.

The Appellant in the instant case is presented with the same dilemma. If he alleges that Cox Construction Company, his employer, was an independent contractor and thus the Road Commission was a third person against whom recovery may be sought, then, by definition, the State Road Commission could not exercise sufficient control over Appellant's employer to be liable for its negligence in the performance of the construction work. On the other hand, in order for Appellant to support his claim that the Road Commission owed him a duty to inspect and supervise the work, he must con-

cede that Cox Construction Company was not an independent contractor and thus his action is barred by Sec. 35-1-60, U.C.A. 1953, as amended, because Workmen's Compensation is his exclusive remedy.

The Appellant attempts to avoid this dilemma by claiming the Road Commission violated a duty that did not arise out of the employment relationship between the Commission and Cox Construction Company. Appellant argues that the Road Commission employee, Drew Rasmussen, assumed a duty upon which recovery may be based because he voluntarily attempted to warn the crane operator of danger. In support of this contention, Appellant cites *Restatement of Torts, 2d,* §§323 and 324A, which states that one who undertakes to render services for the protection of another is liable when he fails to exercise reasonable care, if:

> (a) his failure to exercise reasonable care *increases* the risk of such harm, or
>
> **(b) he has undertaken** to perform *a duty owed by the other* to the third person, or
>
> (c) the harm is suffered because of *reliance* of the other or the third person upon the undertaking.

The State does not challenge the validity of this "Hornbook tort law," but the undisputed facts clearly demonstrate that Appellant's theory is not applicable in this case. In any event, the legislature has barred any recovery on such a theory by making Workmen's Compensation the Appellant's sole remedy.

The Appellant does not allege that Road Commission employee Drew Rasmussen committed any affirmative acts of negligence. Rather, Appellant contends Rasmussen should have either stopped the crane operator or continued his supervision of the operation of the crane. (Appellant's Brief, p. 24). At no time did Rasmussen ever "supervise" the operation of the crane or undertake to do so. By merely warning Brent Cox, and, at Cox's request, asking the crane operator to move the crane, Rasmussen clearly did not *increase* any hazard. He merely acted under Cox's direction. The undisputed facts also show that the operator failed to heed these warnings to move away from the wire and, therefore, no harm was suffered because of *reliance* upon Rasmussen's actions. Quite to the contrary, the Appellant was injured because his fellow employee failed to rely upon these warnings.

Finally, if Rasmussen's actions were "undertaken to perform a duty owned by the other [employer] to the third person [employee]," Appellant's sole remedy is Workmen's Compensation. Sec. 35-1-60, U.C.A., 1953, as amended, states:

> The right to recover compensation pursuant to the provisions of this title for injuries sustained by the employee . . . shall be the *exclusive* remedy against the employer. . . . (Emphasis added).

This Court has consistently and uniformly held that voluntary assumption of supervisory functions has been held to create an employer-employee relationship barring recovery irrespective of the prior relationship be-

tween the parties. *Sommerville v. Industrial Commission,* 113 Utah 504, 196 P.2d 718 (1948); *Parkinson v. Industrial Commission,* 110 Utah 309, 172 P.2d 136 (1946); *Luker Sand and Gravel Co. v. Industrial Commission,* 82 Utah 188, 23 P.2d 225 (1933); *Utah Fire Clay Co. v. Industrial Commission,* 86 Utah 1, 40 P.2d 183 (1935); *Maryland Casualty Co. v. Industrial Commission,* 12 Utah 2d 223, 364 P.2d 1020 (1961); *Stevens v. Colorado Fuel and Iron,* 24 Utah 2d 214, 469 P.2d 3 (1970); *Doyle v. Facilities, Inc.,* 29 Utah 2d 41, 504 P.2d 1006 (1972).

Consequently, since the Appellant's only theory of liability against the State Road Commission fails because no facts support its application and because liability is precluded by statute, the Court should affirm the judgment of the court below.

POINT II

APPELLANT'S CLAIM AGAINST THE STATE OF UTAH IS BARRED BY THE WORKMEN'S COMPENSATION ACT.

Appellant contends that the Industrial Commission and the State Road Commission violated a duty to protect him against any unsafe procedures employed by Cox Construction Company. Whether this alleged duty to protect him arises by statute or by voluntarily undertaking to act for his benefit, the Appellant's claim is nevertheless barred by the Workmen's Compensation Act because the State of Utah would be an employer and its agents would be the Appellant's co-employees or supervisors within the meaning of the Act.

This Court has consistently held that the right to exercise control over the manner in which work is executed is the hallmark of the employer's status within the meaning of the Workmen's Compensation Act. Any acts of negligence by State employees within the course and scope of their employment undertaken to control or supervise the construction work would be acts of the State in an employer capacity.

Sec. 35-1-60, U.C.A., 1953, as amended, states:

> The right to recover compensation pursuant to the provisions of this title for injuries sustained by an employee . . . shall be the *exclusive* remedy against the employer. . . . (Emphasis added).

The Workmen's Compensation Act defines "employer" in Sec. 35-1-42, as follows:

> The following shall constitute employers subject to the provisions of this title:
>
> (1) The State and each county, city, town and school district therein,
>
> * * *
>
> *Where an employer procures any work to be done wholly or in part for him by a contractor over whose work he retains supervision or control,* and such work is a part or process in the trade or business of the employer, *such contractor, and all persons employed by him,* and all subcontractors under him, and all persons employed by any such subcontractors, *shall be deemed, within the meaning of this section, employees of such original employer....* (Emphasis added.)

Consequently, if, as Appellant alleges, the State of Utah procured work to be done by the Cox Construction Company over which the State retained or exercised supervision or control, then the Cox Construction Company and all its employees, including the Appellant, were employees of the State within the meaning of Sec. 35-1-42. If the Appellant is deemed an employee of this State, then his exclusive remedy is Workmen's Compensation.

As the Utah Supreme Court stated in *Sommerville v. Industrial Commission,* 113 Utah 504, 196 P.2d 718 (1948):

> It is well settled in this jurisdiction that the crucial factor in determining whether an applicant for workmen's compensation is an employee or an independent contractor is whether or not the person for whom the services were performed had the right to control the execution of the work. 196 P.2d at 720.

To the same effect are: *Parkinson v. Industrial Commission,* 110 Utah 309, 172 P.2d 136 (1946); *Luker Sand and Gravel Co. v. Industrial Commission,* 82 Utah 188, 23 P.2d 225 (1933); *Utah Fire Clay Co. v. Industrial Commission,* 86 Utah 1, 40 P.2d 183 (1935); *Maryland Casualty Co. v. Industrial Commission,* 12 Utah 2d 223, 365 P.2d 1020 (1961).

The Appellant alleges that the Industrial Commission inspectors and the Road Commission personnel not only had the authority to dictate the manner in which the work of Cox Construction Company would be con-

ducted, but also had the duty to do so. He urges that the State, through its Road Commission and Industrial Commission agents, should not have permitted the Cox Construction Company to pour cement under the power line with the assistance of a boom crane, should not have permitted the operation of the crane without an observer, and should not have continued work until the power line had been de-energized.

It should be noted that operating a crane under a power line is permissible under the safety regulations promulgated by the Industrial Commission and the Highway Department if ten (10) feet of clearance is maintained. Thus, the contractor could properly and safely operate the crane in connection with the pour if the minimum was maintained.

The authority to supervise the specific manner in which work was to be performed relied upon by the Appellant is the precise factor which precludes a recovery against the State. As the Court in *Parkinson v. Industrial Commission,* 110 Utah 309, 172 P.2d 136 (1946) stated:

> It is when the employer cannot only determine where the work shall be done but how it shall be executed that the relationship is that of employer-employee. 172 P.2d at 140.

Thus, the instant case is identical to that of *Stevens v. Colorado Fuel and Iron,* 24 Utah 2d 214, 469 P.2d 3 (1970). In *Stevens,* the plaintiff was an employee of a contractor engaged in work on the defendant's property. He claimed that the defendant had a "duty to

inspect and make safe the places where men work'' and that the duty extended to employees of contractors. 469 P.2d at 4. The Court held no relationship existed between the parties giving rise to an affirmative duty to protect the plaintiff because he was an employee of an independent contractor. The Court noted, however, that the plaintiff's cause of action was barred nevertheless, because, if the defendant had a duty to supervise the plaintiff's activity, the defendant became an employer and Workmen's Compensation was the exclusive remedy against him.

The Appellant's claim is also barred as a matter of law because the actions of any State employee that may have contributed to the accident would have been undertaken as a co-employee and not as a third person against whom recovery may be sought. Since the plaintiff applied for and has received an award paid pursuant to the Workmen's Compensation Act, a suit may be brought only in accordance with Sec. 35-1-62, U.C.A., 1953, as amended, which states, in its relevant part:

> When any injury or death for which compensation is payable under this title shall have been caused by the wrongful act or neglect of another person, *not in the same employment,* the injured employee . . . may also have an action for damages against such third person. (Emphasis added).

In *Peterson v. Fowler,* 27 Utah 2d 159, 493 P.2d 997 (1972), this Court set forth the guidelines for determining whether or not employees are engaged in the same employment within the meaning of Sec. 35-1-62.

In *Peterson,* the plaintiff's deceased was an employee of a general contractor killed when the scaffolding upon which he was standing collapsed. Plaintiff brought suit against an independent contractor that had negligently maintained the scaffolding claiming that the defendant was a "person not in the same employment." Affirming the trial court's summary judgment for the defendant, the Court held that the relationship between the parties was such that they were fellow servants and thus persons in the same employment. The Court set forth the following test for determining when persons are in the same employment within the meaning of Sec. 35-1-62:

> To be fellow servants, they must be engaged in the same line of work and labor together in such personal relations that they can exercise an influence upon each other promotive of proper caution and respect of their mutual safety. They should be at the time of the injury directly operating with each other in the particular business at hand, or they must be operating so that mutual duties bring them into such co-association that they may exercise an influence upon each other to use proper caution and be so situated in their labor to some extent as to be able to supervise and watch the conduct of each other as to skill, diligence, and carefulness. When workmen are so engaged, we think they are working in the same employment. 493 P.2d at 1000.

The fact that the relationship between employees is merely temporary will not prevent them from being in the same employment, if the accident occurred while they were engaged in the same project. *See, e.g., Barnes v. Wheeler Machinery Co.,* 520 P.2d 877 (Utah 1974).

In the instant case, Appellant argues that State employees had an opportunity to supervise and watch the conduct of the crane operator as to skill, diligence and carefulness and, yet, failed to exercise their influence upon him to use proper caution. But, as this Court recognized in *Peterson v. Fowler,* supra, "When workers are so engaged they are working in the same employment" and all separate actions are expressly prohibited. 493 P.2d at 1000.

The Appellant's own contentions place this action squarely within the cagetory of cases barred by the Workmen's Compensation Act. Consequently, this Court should affirm the judgment of the Court below.

POINT III

THE NEGLIGENCE OF COX CONSTRUCTION COMPANY CONSTITUTES THE SOLE PROXIMATE CAUSE OF APPELLANT'S INJURIES.

Appellant's claim against the State of Utah is founded upon the contention that the State passively stood by when the danger of contact with the high voltage wire became foreseeable. Even assuming the validity of Appellant's argument, the undisputed facts clearly demonstrate that the active negligence of the crane operator constitutes the sole proximate cause of the accident terminating any passive negligence of the State of Utah as a legal cause of the accident.

In *Kimiko Toma v. Utah Power & Light Co.,* 12 Utah 2d 278, 365 P.2d 788 (1961), this Court upheld a di-

rected verdict dismissing the plaintiff's claim in a situation identical to the instant case. In *Kimiko Toma,* a workman was electrocuted when a crane boom made electrical contact with a power line during a cement pouring operation. The plaintiff sued the power company for failing to inspect the construction area and to either deactivate or remove the power lines.

The Court recognized that the power company officials had a duty to keep themselves informed of the progress of the construction work because it was foreseeable that an accident could occur. Unless the possibility of electrocution by contact with the wire could have been foreseen, no duty would have existed to inspect the premises and to alleviate the danger by terminating or insulating electrical power for the cement pour. The Court stated:

> It was the duty of the defendant under existing circumstances to exercise a high degree of care to maintain its wires in such condition and in such a way as to avoid accidents. A high degree of *foresight* is required because of the character and behavior of electricity which it sells.
>
> * * *
>
> It is our conclusion the Utah Power & Light Co. would have the obligation to keep themselves informed generally of changing conditions and circumstances. 365 P.2d at 792. (Emphasis added).

Notwithstanding the actual foreseeability of the danger of contact with the wire, the Court held that the subsequent active negligence of the crane operator by proceeding in the face of such a known danger is not *legally foreseeable.* Consequently, the passive negligence

of the power company was terminated as a legal cause of the accident because the subsequent active negligence constituted the sole proximate cause of the accident. Placing sole responsibility for the accident upon the construction company, this Court stated:

> Thus, even though the Utah Power & Light Co. had negligently created a dangerous situation, and negligently continued to maintain such a condition by refusing to cut off the power, the Mountain States Construction Company did have knowledge of such condition and failed to avoid the impending disaster. On the contrary the Mountain States Construction Company put into motion the actions which created the accident. Id. at 794.

In the instant case, it is not disputed that the crane operator, as well as the construction supervisor on the site, had actual knowledge of the condition and failed to avoid the impending accident. On two occasions just minutes before the accident occurred, the crane operator was warned of the danger and was asked to move away from the wire. [Appellant's Brief, p. 7-8]. This is not a case where the construction company failed to discover the hazard in in time to avoid it. To the contrary, Appellant concedes that the construction company knew of the imminent danger posed by the high voltage line and, yet, inexplicably proceeded in disregard of the peril. It is that action that is legally unforeseeable and terminates all prior passive negligence.

Appellant attempts to distinguish *Kimiko Toma* by arguing that facts may exist supporting his belief that proceeding in the fact of such danger may have been

foreseeable. In so doing, he fails to recognize that, as a matter of law, and therefore irrespective of such facts, it is never *legally foreseeable* that a person having knowledge of imminent peril will fail to avoid it when he has a reasonable opportunity to do so.

The facts of the instant case clearly place the Appellant's claim squarely within the rule set forth in *Komiko Toma.* The trial court clearly did not err in holding, as a matter of law, that the State cannot be liable for the injuries suffered by this Appellant. Consequently, this Court should affirm the judgment of the court below.

CONCLUSION

The Court should affirm the summary judgment in favor of the State of Utah because the Road Commission and the Industrial Commission owed no legal duty to the Appellant, because the Workmen's Compensation Act precludes the Appellant's asserted claim and the negligence of the Appellant's employer constitutes the sole proximate cause of his injuries.

Respectfully submitted,

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